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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1933.

STATE OF FLORIDA, Et Al.,
APPELLANTS,

versus

No. 342

UNITED STATES OF AMERICA, Et Al.,
APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

SUPPLEMENTAL AND SEPARATE BRIEF OF THE STATE OF FLORIDA, EUGENE S. MATTHEWS, MAMIE EATON-GREENE AND W. B. DOUGLASS, AS RAILROAD COMMISSIONERS OF THE STATE OF FLORIDA.

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SUBJECT INDEX

Page

Reference to Official Reports, Statement as to Jurisdiction, Statement of the Case, and Specification of Assignments of Error Intended to be Urged 2

ARGUMENT 3

Summary 3

POINT I.

Section 205 of the Emergency Railway Transportation Act, 1933, effaced the affirmative duty of the Interstate Commerce Commission to initiate, modify, establish or adjust rates, and thus destroyed the "dovetail" relationship between Section 13 (4) and Section 15a of the Interstate Commerce Act, as amended 5

(a). If the Emergency Railway Transportation Act, 1933, has materially modified the law since the appeal was taken, this Court will apply the law in effect at the time when its judgment was rendered, notwithstanding that the new law was enacted after the appeal was taken 7

(b). It was solely because of the dominating force of former Section 15a of the Interstate Commerce Act that the Commission under Section 13 (4) of that Act was authorized to invade State domain and fix intrastate rates in the interest of carrier revenue 8

(c). The context, purpose and effect of New Section 15a of the Interstate Commerce Act 16

(d). The Emergency Railway Transportation Act, 1933, having intervened and materially modified the law since the appeal was taken, the Court will apply the law in effect at the time that its judgmen is rendered, notwithstanding that the new law was enacted after the appeal was taken 18

(e). The purpose of the grant of authority having been effaced, the grant will be deemed to be inoperative and ineffective in any event, if still existent at all would be an authority which it is improper for the Commission to exercise 24

(f). The meaning to be ascribed to Section 13 (4) after the effacement of the mandatory provisions of Section 15a 25

(g). When in the exercise of Federal power Congress enacts a law which supersedes state powers and afterwards the Federal act is repealed or becomes inoperative and ineffective, the state law which had been theretofore superseded, automatically becomes operative and effective 31

(h). There is no dovetail relation between Sections 13 (3) and (4) and new Section 15a, which does or could authorize the Commission to strike down a single intrastate rate upon a single railroad, solely in the interest of carrier revenue 32

POINT II.

Any attempt On the Part of Congress to Authorize the Commission to Fix a Single Intrastate Rate Upon A Single Commodity, Over a Single Railroad, in a Single State, Solely Because of the Non-Compensatory (or Confiscatory) Level of the Intrastate Rate, Would Be Beyond its Constitutional Powers Under the Circumstances Disclosed by This Record. If Any Such Attempt Has Been Made to that Extent Its Act Is Inoperative and Ineffective 35

POINT III.

At the Time When the Commission Entered Its Reports and Orders There Was No Substantial Disparity Between the Cummer Scale of Rates and the General Level of Interstate Log Rates Existing in the Southern Rate Group. Hence the Commission was Without the Power to Interfere with the Intrastate Rates in Florida and in Attempting to Do So Its Action was Arbitrary and Unreasonable 36

(a). The Nature of the Power Here Sought to be Exercised by the Commission 38

(b). There was No "Substantial Disparity" Between Interstate and Intrastate Rates Upon Which the Commission Could Act 40

POINT IV.

The Findings Which This Court Has Declared to be "Basic or Essential" to the Making of a Valid Order by the Commission Here Have Not Been Made 43

(a). There was no Finding and No Evidence as to the "Revenue which Had Been Derived by the Carrier from the Traffic in Question" 44
(b). There Was No Finding as to the "Revenue Which Could Reasonably be Expected Under the Increased Rates", and No Evidence which would Support Such a Finding 45
(c). There Was No Finding that "The Alteration of the Intrastate Rates would Produce, or was Likely to Produce, Additional Income Necessary to Prevent an Undue Burden Upon the Carrier's Interstate Revenues, and to Maintain an Adequate Transportation Service", and No Evidence Upon Which Such a Finding Could be Supported 49

POINT V.

The Cost Evidence is Insufficient to Supply the Essential Facts as to the Particular Traffic and Revenue and the Effect of the Intrastate Rates upon the Income of the Carrier 51
(a). The Cost Evidence Produced by the Carrier 52
(b). The Cost Evidence Prepared by the Commission 56
(c). There was No Justification for the Conclusions Reached by the Commission and by the District Court from the Cost Evidence 60

POINT VI.

The Intrastate Rates Prescribed by the Commission's Order Were Minimum Rates Definitely Fixed at a Particular Level and Not Related to or Dependent Upon Any Interstate Rates. The Prescription of Such Rates by the Commission is Unlawful and Arbitrary 64

POINT VII.

The State of Florida is Entitled to a Trial De Novo Upon the Existence of the Jurisdictional Facts Which Would Entitle the Federal Authority to Invade the State Domain 66

(a). When the Determination of the Existence of the Jurisdictional facts upon Which Rests the Jurisdiction of an Administrative Agency to Act Involves Constitutional Rights, One Whose Constitutional Rights are Invaded by such Determination, is Entitled to a Trial Before the Court Upon the Existence of those Jurisdictional Facts 68

(b). The Character of Judicial Review of the Jurisdictional Facts Accorded by the District Court in This Case Was Improper and Insufficient 73

CONCLUSION 76

TABLE OF CASES CITED

Page

Board of Railroad Commissioners v. Great Northern R. Co., 281 U. S. 412 27

Butler v. Goreley, Assignee, 146 U. S. 303 31

California Growers & Shippers Protective League v. S. P. R. Co., 129 I. C. C. 25 60

Chastleton Corp. v. Sinclair, 264 U. S. 543 ..... 17, 19, 29

Crowell v. Benson, 285 U. S. 22 68

Dayton Goose-Creek R. Co. v. United States, 263 U. S. 456 ..... 12, 40

Florida v. U.S. 282 U.S. 194 ..... 13, 18, 25, 33, 38, 39, 41, 43, 63
Georgia Public Service Commission v. Atlantic Coast Line Railroad, 186 I. C. C. 157 ..... 38, 45, 46, 48
Georgia Public Service Commission v. Atlantic Coast Line Railroad, 190 I. C. C. 588 ..... 37, 47
Green vs. United States, (CCA 9) F. (2d) 22
Gulf, Colorado & S. F. R. Co. v. Dennis, 224 U. S. 503 ..... 20, 22, 24
Illinois Central R. Co. vs. State Public Utilities Comm., 245 U. S. 493 29
Knoxville vs. Knoxville Water Co., 212 U. S. 1 33
New York v. U. S. 257 U. S. 591 ..... 11, 39
Northern P. R. Co. v. Dept. of Public Works 268 U. S. 39 80
Perrin v. U. S. 232 U. S. 478 ..... 17, 29
R. R. Com. of Wis. 5 C. B. & Q. R. Co. 257 U. S. 563 ..... 9, 28, 39, 41
Simpson v. Shephard, 230 U. S. 352 ..... 34, 66
The I. C. C. Act as Amended by the Transportation Act of 1920 (Sections 13 (3), (4) and 15a, 41 Stat. L. 484, 488) 81
The Emergency Railway Transportation Act, 1933 (Section 205) 5, 6
U. S. v. Alaska S. S. Co. 253 U. S. 113 22
U. S. v. La. (not reported) 14, 41
U. S. v. Schooner Peggy, 1 Cranch 103 19

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On behalf of the State of Florida, and Eugene S. Matthews, Mamie Eaton-Greene and W. B. Douglass, as Railroad Commissioners of the State of Florida, we joined in the brief filed by and on behalf of all of the Appellants involved in this appeal. We concur in and rely upon all that

was said in that brief. But there are important questions here (some of which are not covered in the brief above-mentioned), involving the respective operations of the State and National governments, and involving the reserved power of the State. On that account, we feel that those matters should be presented to this Court by and on behalf of the State sovereign itself and its responsible officers themselves, in their own way and in their sovereign and official capacities. This we shall try to do with no more duplication than can reasonably be avoided. And where duplication of ideas is unavoidable, we have presented our views as concisely and briefly as possible without extended argument.

REFERENCE TO OFFICIAL REPORTS, STATEMENT AS TO JURISDICTION, STATEMENT OF THE CASE, AND SPECIFICATION OF ASSIGNMENTS OF ERROR INTENDED TO BE URGED.

References, statements and specifications referred to in this caption are set forth at pages 2 to 31 of the principal brief filed on behalf of all Appellants (hereinafter referred to as the Main Brief). They are full and complete and are here adopted and confirmed as a part of this Supplemental and Separate Brief.

In addition to the statement of the case set forth in the Main Brief we now point out that since the entry in the District Court of the Final Decree appealed from, and since this appeal was taken, the Emergency Railway Transportation Act, 1933, has become the law of the Land, and has effected sweeping changes in the Interstate Commerce Act,

as amended, which among other things, will be the subject matter of argument in the subsequent portions of this Brief.

ARGUMENT.

Summary

The points which will be argued in this brief are as follows:

Point I.

Section 205 of the Emergency Railway Transportation Act, 1933, effaced the affirmative duty of the Interstate Commerce Commission to initiate, modify, establish or adjust rates, and thus destroyed the "dovetail" relationship between Section 13 (4) and Section 15a of the Interstate Commerce Act, as amended.

Point II.

Any attempt on the part of Congress to authorize the Commission to fix a single intrastate rate upon a single commodity, over a single railroad, in a single state, solely because of the non-compensatory (or confiscatory) level of the intrastate rate, would be beyond its constitutional powers under the circumstances disclosed by this record. If any such attempt has been made, to that extent its act is inoperative and ineffective.

Point III.

At the time when the Commission entered its reports and orders there was no substantial disparity between the

Cummer scale of rates and the general level of interstate log rates existing in the Southern Rate Group. Hence the Commission was without the power to interfere with the intrastate rates in Florida and in attempting to do so its action was arbitrary and unreasonable.

Point IV.

The findings which this Court has declared to be "basic or essential" to the making of a valid order by the Commission here have not been made.

Point V.

The cost evidence is insufficient to supply the essential facts as to the particular traffic and revenue and the effect of the intrastate rates upon the income of the carrier.

Point VI.

The intrastate rates prescribed by the Commission's order were minimum rates definitely fixed at a particular level and not related to or dependent upon any interstate rates. The prescription of such rates by the Commission is unlawful and arbitrary.

Point VII.

The State of Florida is entitled to a trial *de novo* upon the existence of the jurisdictional facts which would entitle the Federal authority to invade the State domain.

POINT I.

SECTION 205 OF THE EMERGENCY RAILWAY TRANSPORTATION ACT, 1933, EFFACED THE AFFIRMATIVE DUTY OF THE INTERSTATE COMMERCE COMMISSION TO INITIATE, MODIFY; ESTABLISH OR ADJUST RATES, AND THUS DESTROYED THE "DOVE-TAIL" RELATIONSHIP BETWEEN SECTION 13 (4) AND SECTION 15a OF THE INTERSTATE COMMERCE ACT, AS AMENDED.

The final decree in this cause was entered on February 24th, 1933. In due course the assignments of errors were filed on April 19th, 1933. The Emergency Railway Transportation Act, 1933, became the law on June 16th, 1933. But the constitutional and statutory power of the Interstate Commerce Commission is challenged by the bills and supplemental bills in the Court below, as well as in the assignments of error upon this appeal (Assignments of Error 40, 41, 42 and 44, R. 1392-1393). We think the argument made under this point requires no assignment of error to support it, but if it does, the assignments last referred to are broad enough.

Section 205 *of the Emergency Railway Transportation Act,* 1933 (*Approved June* 16, 1933) *is as follows*:

"Section 205. Section 15a of the Interstate Commerce Act, as amended (U. S. C., title 49, sec. 15a), is amended to read as follows:

"'Sec. 15a. (1) When used in this section, the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

"'(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.'"

The quoted section of the Act of June 16, 1933, entirely supersedes former Section 15a, which was written into the Interstate Commerce Act by Section 422 of the Transportation Act of February 28, 1920. There is no saving clause. Former Section 15a, thus displaced by new Section 15a, is printed in the Appendix.

The Transportation Act of 1920 likewise inserted in the Interstate Commerce Act Sections 13 (3) and (4). Those sections authorized the Interstate Commerce Commission to deal directly with intrastate rates where they were unduly discriminatory against interstate commerce. They are printed in the Appendix of this brief. The pertinent portion of the latter section is as follows:

"(4) Whenever in any such investigation the commission, after full hearing, finds that any such

rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. * * * ".

(a) If the Emergency Railway Transportation Act, 1933, Has Materially Modified the Law Since the Appeal was Taken, this Court Will Apply the Law in Effect at the Time When Its Judgment was Rendered, NOTWITHSTANDING that the New Law Was Enacted After the Appeal was Taken.

The soundness of the principles stated in the foregoing sub-caption we shall demonstrate from an examination of the authorities in a subsequent sub-caption of this topic. But we shall first examine the statutes and the authorities to determine the extent to which the controlling law and the former purpose of Congress has been altered by it.

(b) It was Solely Because of the Dominating Force of Former Section 15a of the Interstate Commerce Act that the Commission Under Section 13 (4) of that Act was Authorized to Invade State Domain and Fix Intrastate Rates in the Interest of Carrier Revenue.

Former Section 15a, from its enactment, has been known as the revenue section of the Interstate Commerce Act. By its terms Congress commanded the Interstate Commerce Commission to,

> " * * * initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the commission may from time to time designate) will * * earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation, * * * ".

It contained other elaborate provisions for the determination of a fair return, recapture of any excess, and the distribution of it through loans and otherwise, to members of the carrier group.

Never yet has this Court sustained the power of the Interstate Commerce Commission to invade state domain and to fix intrastate rates in the interest of carrier revenues without pointing out in effect that the driving force behind such construction was the mandate of Congress contained in former Section 15a.

The provisions of Section 13 (4) which were construed to authorize the Commission to thus invade state domain have in each instance been construed by this Court to be in effect supplementary to (as distinguished from independent of) the dominating force of Section 15a, a construction reached by interpretation in order that the mandate and purpose of Section 15a might be executed.

This Court first considered the "dove-tail relationship" between the two sections in the Wisconsin Passenger Fares Case, (*Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 *U. S.* 563). There the Court, in referring to Section 15a, said (Text 584):

> "The latter, the most novel and most important feature of the act, *requires* the Commission so to prescribe rates as to enable the carriers as a whole or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation. For two years, the return is to be 5½ per cent, with ½ per cent for improvements, and thereafter is to be fixed by the Commission". (Italics supplied).

In further discussing Section 15a, and allied provisions, the Court said (text 585):

> "The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to

maintain an adequate railway service for the people of the United States. This is expressly declared in Section 15a to be one of the purposes of the bill".

In considering the authority of the Commission to perform the "affirmative duty" cast upon it by Section 15a to execute the declared purpose of that Section, the Court pointed out that intrastate rates and the income therefrom played an important part in the income of the carriers, and that if the rates in intrastate commerce were fixed at a substantially lower level than those in interstate commerce, the share which the intrastate traffic would contribute would be proportionately less than that contributed by the interstate traffic, and said (text 586):

> "If the railways are to earn *a fixed net percentage of income*, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining *an adequate railway system*. Section 15a confers no power on the Commission to deal with the intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its powers to prescribe just and reasonable rates;' i.e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to para-

graph 4, Section 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce', it is impossible to escape the *dovetail relation* between that provision and the *purpose of Section* 15a. If *that purpose* is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, and unjust discrimination against interstate or foreign commerce' within the ordinary meaning of those words". (Italics supplied).

In further considering the pertinent words in Section 13 (4), to-wit, "undue, unreasonable and unjust discrimination against interstate or foreign commerce", and by interpretation welding them into the weapon by which the purpose of Section 15a would be accomplished, the Court said further (text 587):

> "When we find that they aptly include a kind of discrimination against interstate commerce which the operation of the new act for the first time makes important, and which would seriously obstruct its chief purpose, we cannot ignore their necessary effect."

And in the companion case of the *Wisconsin case* (supra), to-wit, *New York vs. United States*, 257 *U. S.* 591), decided the same day, the Court in considering another general revenue order entered by the Interstate Commerce

Commission increasing passenger fares and milk rates in the State of New York again considered the meaning and force of former Section 15a of the Interstate Commerce Act, and said (text 601-602):

> "If the lower level of intrastate fares and rates is to be maintained, it will discriminate against interstate commerce, in that it will require higher fares and rates in the interstate commerce of the state to secure the income for which the Interstate Commerce Commission must attempt to provide by fixing rates under Section 15a of the Interstate Commerce Act, as amended by Section 422 of the Transportation Act of 1920 (41 Stat. at L. 456, 488, chap. 91), in carrying out the declared congressional purpose 'to provide the people of the United States with adequate transportation' ".

In *Dayton-Goose Creek Railway Company v. United States*, 263 *U. S.* 456, this Court examined the constitutionality and effect of Section 15a and the purpose of Congress in requiring the Commission to prescribe rates which would yield a fair return for the railroads and subject to recapture a part of the surplus earnings. The Court pointed out that the recapture clauses were the key provisions "of the whole plan". The Court there spoke through Mr. Chief Justice Taft, through whom it spoke in the Wisconsin Passenger Fares Case and the New York v. United States case (supra). The Dayton-Goose Creek Case is here cited to show the dominating effect of former Section 15a upon the con-

struction placed by the opinion upon the duties of the Commission with respect to rates.

And again, upon the former appeal respecting these very intrastate log rates, in *Florida v. United States*, 282 *U. S.* 194, this Court said (text 210-212):

> "The power of the Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against interstate commerce is not open to dispute. (citing cases). In the exercise of this power, the Congress has given to the Commission authority not only to remove an undue prejudice as between persons or localities, but to establish a statewide level of intrastate rates when this is found to be *necessary to accomplish* the purpose of the statute. *In construing the statute this Court has held that the general provision of section* 13 (4) *prohibiting 'unjust discrimination against interstate commerce' and authorizing the Commission to establish intrastate rates to prevent such discrimination, is to be read in connection with Section* 15a, *both of which were added by Transportation Act,* 1920 (secs. 416, 4[illegible], 41 Stat. *at L.* 484, 488). *There is what this Court has called a 'dovetail relation' between the two provisions. The authority granted by section* 13 (4) *is thus to be considered in the light of the affirmative duty of the Commission to fix rates and to take other important steps to maintain an adequate national railway system.*

"As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the Act requires that intrastate traffic should pay 'a fair proportionate share' of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it. *Railroad Commission v. Chicago, Burlington & Quincy Railroad Company, supra; New York v. United States, supra.*

"The question in the present case, then, is not one of authority, but of its appropriate exercise. *The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear*". (Italics supplied).

And in *United States v. State of Louisiana, et al.*, (decided this term, Nov. 6, 1933, No. 17), this Court had before it another general revenue case arising out of the Fifteen Percent Case, 1931. This Court again examined the relationship between former Section 15a and Section 13(4) of the Interstate Commerce Act, and the effect of the

former upon the construction to be placed upon the latter, and in so doing said:

> "This Court has consistently held that this section is to be construed *in the light of section* 15a (2) *and as supplementing it*, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases *in which disparity of the latter rates operates to thwart the broad purpose of section 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return*. So construed, section 13 (4) confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate." (Italics supplied).

We respectfully submit that the sum of all the foregoing decisions of this Court is that: (1) Section 13 (4) is insufficient in and of itself to authorize the Interstate Commerce Commission to invade State domain and fix intrastate rates in the interest of carrier revenues; (2) That it is only when that section is read in connection with the mandatory provisions of former Section 15a that this Court finds by interpretation that Section 13 (4) authorizes such invasion of State domain in the interest of carrier revenues; (3) That under the provisions of former Section 15a, it was the *affirmative duty* of the Commission to prescribe

rates which would insure sufficient revenue to provide a fair return for the carrier at all events, and that if the intrastate rates failed to provide their proportionate share of the revenue, it would be the affirmative duty of the Interstate Commerce Commission to supply this deficit by an increase in interstate rates, and thus and thereby cause an obstruction to interstate traffic and a consequent discrimination against interstate traffic within the inhibitions of the supplementing Section 13 (4); (4) That the purpose of the grant of authority found by this Court in "supplementing" Section 13 (4) in its dovetail relation with former Section 15a, was so found by the Court by interpretation to be necessary to enable the Commission to execute the affirmative commands of Congress set forth in former Section 15a which otherwise it could not execute.

(c) The Context, Purpose and Effect of New Section 15a of the Interstate Commerce Act.

New Section 15a does nothing other than direct the Commission that,

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

Gone are all the mandatory requirements with respect to fixed net income and the affirmative duty of the Commission to provide it, the recapture clause, the railway operating fund, and the like, which this Court in the *Wisconsin Case* (supra) referred to as the most important feature of the Act, and in the *Dayton-Goose Creek Case* (supra), described as "the heart of the plan", and which, in all of the revenue cases referred to above, is recognized as evidencing the dominating purpose of Congress with respect to the revenues of the carriers. In their place we have a simple specification of some of the factors which the Commission shall take into account when exercising its power elsewhere given to prescribe just and reasonable rates. And first among those factors is the effect of rates on the movement of traffic. And all of the factors specified are factors which the Commission in the absence of the new statute must give due consideration in any event. Thus we have a complete change in the purpose of Congress with respect to fixed income for the carriers and the affirmative duty of the Commission to fix rates to provide it.

A principle somewhat analogous to the one just asserted is one frequently laid down by this Court to the effect that a statute or part of a statute under a particular state of facts or circumstances may be operative, but when the facts and circumstances change the statute may become inoperative and ineffective.

Chastleton Corp. v. Sinclair, 264 *U. S.* 543.
Perrin v. United States, 232 *U. S.* 478.

(d) The Emergency Railway Transportation Act, 1933, Having Intervened and Materially Modified the Law Since the Appeal Was Taken, the Court Will Apply the Law in Effect at the Time That Its Judgment Is Rendered, Notwithstanding That the New Law Was Enacted After the Appeal Was Taken.

The Interstate Commerce Commission is a subordinate administrative agency of the Congress. It has only such powers and duties as "clearly appear" in the Acts of Congress which have been constitutionally enacted with respect to intrastate rates. And as was pointed out by this Court in the Florida Log Case, supra, even where the existence of a granted power is assumed, that power can be lawfully exercised only to effectuate the purpose of the grant. There, in speaking of the power, the Court says (text 211-212):

> "The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear."

In this case, it must be borne in mind that the questioned order of the Commission, which invaded State domain, is *prospective and continuing* in its character, and if the *purpose of the grant* has been stricken down by the new law or has been so materially modified as to substantially

affect "the propriety of the exertion of the authority", then the order of the Interstate Commerce Commission, even if lawful before the New Act (a thing which we deny), became upon the enactment of the New Act functus officio, or unlawful, and on that ground alone must be set aside.

The decisions of this Court and of the several Circuit Courts of Appeal construing them, bear out this view.

The principal law which we believe here controlling was first laid down by this Court, speaking through Chief Justice Marshall in *United States vs. Schooner Peggy*, 1 *Cranch* (*U. S.*) 103. The appeal there was from the District Court of Connecticut which had condemned a vessel as a prize under the then existing laws. Pending the appeal, there was proclaimed by the President a treaty convention which had been entered into by the two governments. The Court upon the appeal examined the judgment of the Court below and the convention and found that the former, while in accordance with the law when entered, was in contravention of the subsequently proclaimed convention.

In setting aside the judgment of the Court below, this Court, speaking through the Chief Justice, said in part (text 110):

> "'It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. * * * In such a case the court must decide according to

existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.' "

And in *Gulf, Colorado & Santa Fe Railway Company vs. Dennis*, 224 *U. S.* 503, the Court again considered some of the principles here involved. The defendant in error, plaintiff below, had recovered a judgment for $75.00, including a statutory attorneys' fee of $20.00, in a justice's court in Texas. That judgment had been affirmed by the county court, the highest court in the State to which the case could be carried, considering the amount involved. Writ of error was taken from the county court to this Court.

The sole Federal question involved was whether the statute awarding the attorneys' fee was repugnant to the due process of law and equal protection clauses of the 14th Amendment to the Constitution of the United States. Pending an appeal, the statute was held invalid by the highest court of the State because the subject to which it related was not sufficiently expressed in the title to satisfy the *State Constitution.*

The Court examined the authorities including *United States vs. Schooner Peggy*, supra, and quoted with approval the identical language of Chief Justice Marshall, set forth above. It held that the principles laid down by Chief Justice Marshall were applicable in the case there under consideration. This Court pointed out that its jurisdiction was founded solely upon the Federal question, but that the State statute having been held invalid by the highest court of the State upon a non-Federal question, this Court would reverse

the cause and remand it to the Court from which it came so that the Court might apply to it the principles which had been determined by the Supreme Court of Texas after the case came to this Court. This Court declared where; pending writ of error, a statute of the state or a decision of its highest judicial tribunal intervenes and puts an end to the right which the judgment sustains, the Court should not ignore the changed situation and affirm or reverse the judgment with sole regard to the Federal question. But that on the contrary, it was the duty of the Court to recognize the changed situation and either to apply the intervening law or decision, or to set aside the judgment and remand the case so that the state court might do so.

In its conclusion, the Court said (text 509):

> "The present case is not one in which the writ should be dismissed, because that would leave the judgment to be enforced as rendered, which the intervening decision shows ought not to be done. Instead of being an obstacle to granting any effectual relief to the plaintiff in error, that decision constitutes in itself an all-sufficient ground for relieving it from the attorneys' fee, independently of the Federal question presented on the record; and for the reasons before stated we think it becomes our duty to vacate the judgment, so that the state court may apply the decision by awarding a new judgment in conformity therewith.
>
> "The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion."

The principles asserted and the procedure followed in the case last cited are peculiarly applicable and appropriate here.

The same fundamental principles of law have lately been applied by two circuit courts of appeal, namely the Second and the Ninth Circuits, in disposing of writs of error coming on to be disposed of by those circuit courts of appeal, after repeal of the 18th Amendment from judgments of conviction entered by the trial courts before the repeal. Those two decisions are *Green vs. United States, C. C. A.* (9), decided December 14, 1933, (not yet reported) and *Smallwood vs. United States, C .C. A.* (5), decided December 19, 1933, (not yet reported).

In the Green case, the Court held that the repeal of the 18th Amendment had deprived Congress of the power of legislation on the subject of prohibition in so far as such power is derived from the Amendment. And that the Federal statute containing a saving clause as to criminal prosecutions (Section 13, R. S.) would be unconstitutional if applicable.

In the Smallwood case, supra, the Court, in different words, reached the same conclusion. It relied upon *Gulf, Colorado & Santa Fe Railway Company vs. Dennis, supra.*

United States vs. Alaska Steamship Company, et al, 253 *U. S.* 113, likewise illustrates the principle here discussed There the Interstate Commerce Commission, by its order dated March 4, 1919, had required certain carriers to use certain modified bills of lading, one pertaining to domestic and the other to export transportation.

Suit was filed in the District Court of the United States for the Southern District of New York to enjoin the order

and a temporary injunction was granted by the District Court. It was that order, granting the temporary injunction, which was under review in this Court.

Pending the appeal, the Transportation Act of 1920 was passed by Congress. Shortly afterwards, this Court entered an order requesting counsel to file briefs concerning the effect of the Transportation Act upon the cause. And briefs were filed. The Court examined the Transportation Act of 1920 and found that changes would be required in both forms of the bills of lading (which had been prescribed by the order of the Commission) so that they might conform to the requirements of the new statute.

The Court held that the change in the law had made the case moot, and in the course of the opinion said (text 116):

> "In the present case what we have said makes it apparent that the complainants do not now need an injunction to prevent the Commission from putting in force bills of lading in the form prescribed. The subsequent legislation necessitates the adoption of different forms of bills in the event that the power of the Commission be sustained. This legislation, having that effect, renders the case moot. (Citing cases).
>
> "In our view the proper course is to reverse the order, and remand the cause to the court below with directions to dismiss the petition, without costs to either party, and without prejudice to the right of the complainants to assail in the future any order of the Commission prescribing bills of lading after the enactment of the new legislation."

The necessary effect of the decision of the Court in the Alaska case was *that Congress, by the enactment of the Transportation Act, 1920, had effaced the Congressional purpose evidenced by the former Act and, in so doing, had effaced the order of the Interstate Commerce Commission as well.* And notwithstanding that the Court held the cause moot, the Court effectually adjudged that the order there under attack was functus officio.

The principles involved in the Alaska case and those involved here are alike. The status of the order there and that of the order here are somewhat different in that the order there had been enjoined by the trial court, while in the case at bar, the court below refused to enjoin the order and dismissed the bill. For that reason, the court may deem it more appropriate here to construe and declare the new law which is now applicable to the case, and reverse the cause, with directions to the court below to apply the law as declared by this court, as was done in the case of *Gulf, Colorado & Santa Fe Railway vs. Dennis, supra.*

(e) The Purpose of the Grant of Authority Having Been Effaced, the Grant Will Be Deemed to be Inoperative and Ineffective, or, In Any Event, if Still Existent At All Would Be An Authority Which It Is Improper for the Commission to Exercise.

There can be no doubt that under the decisions of this Court, the purpose of the grant of authority interpreted by this Court to exist in Section 13 (4) of the Interstate Commerce Act, was to enable the Commission to perform its affirmative duty imposed upon it by the mandatory require-

ments of former Section 15a. And the purpose of the grant of authority having been effaced by the repeal of former Section 15a, the grant itself found by interpretation to exist in Section 13 (4) will be deemed to be no longer operative or effective.

But even if the bare authority remains, it is clear that it cannot properly be exercised to invade state domain or to maintain that invasion now that the purpose of the grant has been effaced. That principle, we think, is clearly settled by this Court in its opinion upon the former appeal involving these very log rates.

This Court in discussing the authority granted by Section 13 (4), the "dovetail relation" of that Section to former Section 15a, and the purpose of the grant, said in part (text 211-212):

> "The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear."

(f) The Meaning To Be Ascribed to Section 13 (4) After the Effacement of the Mandatory Provisions of Section 15a.

From the decisions of this Court we must deduce that "supplementing" and being in "dovetail relation" with former Section 15a the words of Section 13 (4) are insufficient, in and of themselves, without the dominating force

of former Section 15a to authorize the fixing of state rates purely in the interest of carrier revenue. There is no doubt that the two branches of the Congress when enacting Section 13 (3) and (4) considered that in and of themselves they did no more than incorporate in legislative enactment the principle of the *Shreveport Case* (234 *U. S.* 342). And that those two paragraphs of Section 13 in and of themselves did not attempt to extend the authority of Congress beyond the then existing law as construed by the Shreveport Case, except to authorize the Commission in like cases to fix the intrastate rate and thus accomplish directly what the Shreveport Case recognized its power to do by indirection.

Paragraphs 3 and 4 of Section 13 were offered as amendments in the Senate and House of Representatives, respectively, each sitting as a Committee of the Whole. And when so offered were explained by the Chairman of their respective Committees having the Transportation Act of 1920 in charge, namely, Senator Cummins and Mr. Esch, both men of long experience and great learning with respect to transportation matters. Their comments in the journals of Congress bear out our statement made above. Excerpts from their comments, respectively, are printed in the margin.*

*In presenting these amendments to the Committee of the Whole House, Mr. Esch, Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, said:

"We also provide for the enactment into law of what is popularly known as the decision of the Supreme Court in the Shreveport Case. Where intrastate rates constitute an undue burden, advantage, preference or prejudice against interstate rates, such rates are declared to be unlawful. We have incorporated into law the decision of the court. When by reason of the low level of the intrastate rates an undue burden is cast upon the interstate traffic, the citizens and the shippers of

We are aware of course, that this Court speaking through Mr. Chief Justice Taft, in the *Wisconsin Passenger Fares Case* (supra), considered the legislative history of the Transportation Act of 1920, and reached the conclusion that the Committee Reports and the debates in Congress showing the Congressional intent were not controlling in the construction of Section 13 (4) in the light of the mandatory provisions of former Section 15a and in the "dovetail relation" found by the Court to exist between those two sections. But the mandatory and controlling provisions of Section 15a are gone. Of the two sections thus construed "in dovetail relationship" with one another, the dominating section has been repealed, and only the "supplementing" section remains. Congress is deemed to have known the importance placed by this Court upon the construction of it in its relation with Section 13 (4) and to have known the

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other states are compelled to pay higher interstate freight rates than they would have had to pay had that state enacted or put into force and effect proper intrastate rates. We give this power of determination to the Interstate Commerce Commission, but in order that the state commissions may have a proper hearing we provide that the state commission may, to use a phrase of the street, 'sit in' with the Interstate Commerce Commission. It can sit with the Interstate Commerce Commission; it can hear the testimony, and can present its full case, through its legally constituted authority. It can present the full case, but the final adjudication is to rest with the Interstate Commerce Commission and not with the state regulatory body. We believe that this getting together of the interstate and state regulatory bodies will lessen the number of Shreveport cases, better the feeling between the interstate and the state commissions, and promote the commercial interests of the country." 59 Cong. Rec. 66th Cong. 1st Sess. vol. 58, pt. 8, p. 8317.

(See Board of R. Comrs. v. Great Northern R. Co. 281 U. S. 412, footnote 5.)

effect of the repeal of the dominant section of the Act. *Thompson vs. Thompson*, 218 *U. S.* 611 (text 616).

We have examined the legislative history of the new Section 15a and find in it no light upon this subject, except the purpose of Congress to abandon the "key provision of the plan", viz the recapture clause and with it all of the mandatory provisions of former Section 15a which supported it. Under all these circumstances we respectfully submit that the legislative history of Sections 13 (3) and (4) now become of great importance in determining whether the grant of authority found by interpretation in Section 13 (4) in its aspect as "supplementing" former Section 15a is now operative or effective to authorize the Interstate Commerce Commission to intermeddle with State rates from a

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Senator Cummins, Chairman of the Committee on Interstate Commerce of the Senate, made the following statement to the Committee of the Whole of the Senate:

"I need not follow that case" (the Shreveport Case) "in all its phases; but it finally reached the Supreme Court of the United States, and the Supreme Court held that the authority of the Federal government as it could be vested in the Interstate Commerce Commission extended to the removal of a discrimination between the interstate rates and the intrastate rates, but no authority had been given by Congress to the commission to declare what the intrastate rate should be in comparison with the interstate rate. . . .

"The committee has attempted simply to express the decisions of the Supreme Court of the United States. We have not attempted to carry the authority of Congress beyond the exact point ruled by the Supreme Court in the cases to which I have referred; and the only thing we have done in the matter has been to confer upon the Interstate Commerce Commission the authority to remove the discrimination when established in a proper proceeding before that body—an authority which it does not now have. . . .

"The Supreme Court held that Congress had not conferred upon the Interstate Commerce Commission the right to prescribe a rate in the stead of one which had been condemned; but so far as the condemnation of the rates is concerned, the power of the Interstate

revenue standpoint alone, now that the driving force of former Section 15a no longer exists. For, as has been pointed out, it is well settled that all or part of an Act of Congress may be operative and effective at one time under one set of circumstances, and inoperative and ineffective at another time and under another set of circumstances.

Chastleton vs. Sinclair, supra.
Perrin vs. United States, supra.

But irrespective of the weight to be given to the legislative history of the Transportation Act, 1920, in construing Section 13 (4) of the Interstate Commerce Act, under the present circumstances, we think that the construction of it is controlled by the principles frequently laid down by this Court and succintly stated by it in *Illinois Central R. Co. vs. State Public Utilities Commission*, 245 *U. S.* 493, as follows:

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested (citing cases). This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the Commission,

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Commerce Commission is already ample, and it has succeeded in one way or another in removing the discriminations which have come under its notice without the statute which we now propose." Cong. Rec. 66th Cong. 2d Sess. vol. 59, pt. 1, pp. 142, 143.

should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty".

This same principle was confirmed by this Court upon the former appeal of the *Florida Log Rate Case* (supra), where the power of the Commission to invade state domain and prescribe intrastate rates was in question. That principle forbids that, the dominating former Section 15a having been repealed, the "supplementing" Section 13 (4) now be construed to authorize the invasion of state domain and determine the reasonableness of intrastate rates *per se* solely in the interest of carrier revenue.

It may be asked then, what meaning may be ascribed to the words "undue, unreasonable or unjust discrimination against interstate or foreign commerce", which is forbidden and declared to be unlawful and which this Court in the cases cited above held to be supplementary to the mandatory provisions of former Section 15a insofar as rates and fares are concerned? It is well in this connection to bear in mind that Section 13 (4) does more than deal with rates, fares and charges; it deals with *classifications, regulations and practices.*

Those latter words in Section 13 (4) were likewise new, and it may well be argued that the inclusion of them in Section 13 (4) had to do with the inclusion of the new language with respect to "undue, unreasonable and unjust discrimination against interstate or foreign commerce". And it might be argued that the power to remove unjust discrimination against interstate commerce as such should now be construed to be applicable to those aspects of the

Interstate Commerce law which under the still existent purpose of Congress the Interstate Commerce Commission has primary and direct control of, such as abandonment proceedings, new constructions and any other matters which have been or which may hereafter be committed to the direct and exclusive jurisdiction of the Commission by present or future valid acts of Congress.

For as has been pointed out, statutes may well be construed to be operative and effective under one set of circumstances and conditions, and inoperative and ineffective under a different set of circumstances and conditions. And the exercise of statutory authority under one set of circumstances and conditions may be proper, whereas under other circumstances and conditions it may be improper. (Cases cited supra). But whatever meaning may be ascribed to those words in the present or future state of the Interstate Commerce Act, it is clear that in the light of the former decisions of this Court they cannot "justify" the invasion of state domain to fix intrastate rates from the standpoint of carrier revenue alone.

(g) When In the Exercise of Federal Power Congress Enacts a Law Which Supersedes State Powers and Afterwards the Federal Act is Repealed or Becomes Inoperative and Ineffective, the State Law Which Had Been theretofore Superseded, Automatically Becomes Operative and Effective.

The principle stated in the sub-caption is borne out by many of the decisions of this Court. *Butler v. Goreley, Assignee*, 146 *U. S.* 303, is illustrative of this point. That case

involved the exercise of Congress of the bankruptcy power by the enactment of the Bankruptcy Act of 1867, and the repeal of that Act in 1878. When the Act of 1867 was passed there was in force and effect in Massachusetts an insolvency statute which was superseded by the Congressional Act last mentioned. The question was whether upon the repeal of the Bankruptcy Act of 1867 the Massachusetts law should have been re-enacted in order to become operative. This Court held not, and in so doing, said (text 314):

> "The repeal of the Bankruptcy Act of the United States removed an obstacle from the operation of the insolvency laws of the State and did not render necessary their re-enactment".

Upon the effacement of the dominating force of Section 15a by its amendment the order of the subordinate body of Congress, even if theretofore lawful (a thing denied), became immediately inoperative and ineffective and state power and state law automatically became operative and effective.

(h) There is No Dovetail Relation Between Sections 13 (3) and (4) and New Section 15a, which Does or Could Authorize the Commission to Strike Down a Single Intrastate Rate Upon a Single Railroad, Solely in the Interest of Carrier Revenue.

Our view is that not even the compelling force of former Section 15a construed with the supplementing aspect of Section 13 (4) was sufficient to authorize the Commission solely in the interest of the revenues of the carrier to invade state domain and strike down a single rate

covering a single commodity upon a single railroad in a single state where no general level had been prescribed for the same commodity throughout the rate group of which that railroad is a part, or at least throughout the territory or area co-terminus with the territory in which is applicable the state rate which is sought to be interdicted. We think that view is supported by the decision of this Court upon the former appeal (*Florida Log Rate Case, supra*), where this Court said: (Text 214)

> "But to justify the Commission in the alteration of intrastate rates, it was not enough for the Commission merely to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness per se of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission."

Certainly this principle is not open to question now that the dominating force of former section 15a has been superseded by the simple specifications of new section 15a. This Court upon more than one occasion has said that the power vested in the judiciary to strike down a state statute or administrative order fixing a state rate because it was confiscatory (which means no more nor less than not reasonably compensatory), involves one of the most important of judicial governmental functions, and one which this Court itself will exercise only where a plain case of confiscation has been made.

Knoxville, v. Knoxville Water Company,
212 *U. S.* 1.

The power of the Federal government to strike down such a State statute or administrative order arises under the due process and equal protection clauses of the Fourteenth Amendment, and rests in the judiciary. It is a wholly different power from any authority ever vested by Congress in the Interstate Commerce Commission under the Commerce clause of the Constitution. The difference in the two rights and powers has frequently been recognized by this Court. *Minnesota Rate Cases*, (*Simpson v. Shepard*, 230 *U. S.* 352 and authorities cited.)

Plainly Congress has not attempted to confer upon a subordinate administrative or quasi-judicial body like the Commission a function which this Court itself so sparingly exercises.

Now that the dominant mandatory provisions of former Section 15a, requiring the Commission to so prescribe rates as to provide a fixed carrier revenue, have been displaced by the simple specifications of some of the factors to be considered when rates are prescribed, it is clear that the relationship between new Section 15a and Section 13 (4) is not such as to confer upon the Commission even *color* of right to make or continue its order here under attack.

Our conviction is that (for the reasons elsewhere asserted) the order here under attack was unlawful and invalid in the first instance; but that if the Commission ever had any authority to intermeddle with the State rate solely in the interest of carrier revenue under any circumstances, that authority is now inoperative and ineffective because of the change in the law set forth above.

POINT II.

ANY ATTEMPT ON THE PART OF CONGRESS TO AUTHORIZE THE COMMISSION TO FIX A SINGLE INTRASTATE RATE UPON A SINGLE COMMODITY, OVER A SINGLE RAILROAD, IN A SINGLE STATE, SOLELY BECAUSE OF THE NON-COMPENSATORY (OR CONFISCATORY) LEVEL OF THE INTRASTATE RATE, WOULD BE BEYOND ITS CONSTITUTIONAL POWERS UNDER THE CIRCUMSTANCES DISCLOSED BY THIS RECORD. IF ANY SUCH ATTEMPT HAS BEEN MADE, TO THAT EXTENT ITS ACT IS INOPERATIVE AND INEFFECTIVE.

(Applicable to Assignments of Error, Nos. 1 to 5 incl., 30 to 33, incl., 40 to 44, incl.)

We feel sure that this Court will not find that the compelling force of former Section 15a, construed in its aspect as being suplemented by Section 13 (4), was sufficient to authorize the Commission to invade State domain and strike down solely because *sic* it is non-compensatory (or confiscatory) a single rate on a single commodity, over a single railroad, in a single State, where no general level has been prescribed for that commodity throughout the rate group of which that railroad is a part, or at least throughout the territory or area co-terminus with the territory in which is applicable the State rate which is sought to be interdicted. Certainly this principle is not open to question now that the dominating force of former Section 15a has been superseded by the simple specifications of new

Section 15a. But if the Court should ascribe any such intent to Congress, then the Court must find that the Interstate Commerce Act as amended is to that extent in operative and ineffective because in conflict with the Tenth Amendment of the Federal Constitution and also because in conflict with Sections 1 and 2, Article III of the Constitution for the reasons set forth in sub-paragraph (h) of Point I above. And we now make and rely upon that contention. And if this question is reached and questioned by the Court we shall be glad to file a separate brief upon it.

POINT III

AT THE TIME WHEN THE COMMISSION ENTERED ITS REPORTS AND ORDERS THERE WAS NO SUBSTANTIAL DISPARITY BETWEEN THE CUMMER SCALE OF RATES AND THE GENERAL LEVEL OF INTERSTATE LOG RATES EXISTING IN THE SOUTHERN RATE GROUP. HENCE THE COMMISSION WAS WITHOUT THE POWER TO INTERFERE WITH THE INTRASTATE RATES IN FLORIDA AND IN ATTEMPTING TO DO SO ITS ACTION WAS ARBITRARY AND UNREASONABLE.

(Applicable to Assignments of Error Nos. 1 to 5, inclusive, and 32 and 33).

As we have pointed out in our main brief, at the very times when the Commission was entering its reports and orders of July 5, 1932, and January 9, 1933, the

carriers very generally throughout the Southern Rate Group were reducing their rates on logs to a level which the Commission itself found (190 I. C. C., text 589) to be "on substantially the same level as the Cummer Scale". The extent of the application of those rates so reduced is shown on the maps (R. 388 and 490), attached to the supplemental bills of complaint herein.

Those rates, so reduced, are the successors of the rates with which the Commission unfavorably compared the Cummer Scale. The representatives of some of the railroads which put these reduced rates into effect testified here (R. 1012-1048) at the instance of the Atlantic Coast Line Railroad, and with one accord showed that logs were not moving freely on those railroads, that the log traffic had been well-nigh destroyed at the high rates theretofore prevailing, and that the rates had been reduced in the hopes of regaining the traffic in some volume.

Those rates, so reduced, are applicable on twenty-two railroads, on intrastate and interstate commerce, in the Southern Rate Group, and in every State in that rate group except West Virginia. They are applicable on [illegible] railroads, on intrastate and interstate commerce, in five States in the Southwestern Rate Group. They are applicable, in intrastate and interstate commerce, in Florida upon four railroads. They are applicable over substantially all of the lines of the Louisville & Nashville Railway, which is controlled through stock ownership by the Atlantic Coast Line Railroad, and over the entire lines of the Nashville, Chattanooga & St. Louis Railway, which, in turn, is controlled through stock ownership by the Louisville & Nashville Railway. The details with res-

pect to the application and extent of these rates so reduced are set forth in our main brief. It is sufficient here to point out that the general level of log rates in the Southern Rate Group has become that of the Cummer Scale or its equivalent, or lower.

(a) The Nature of the Power Here Sought to be Exercised by the Commission.

This Court, upon the appeal from the former order of the Commission, pointed out *(282 U. S., text 208)* that the former order of the Commission, insofar as it related to interstate rates, was limited "to transportation from points in the Northern part of Florida to points in Georgia", and that this interstate commerce was "potential, no actual movement from Florida to Georgia having been shown". In its report of July 5, 1932, the Interstate Commerce Commission said (186 I. C. C., text 190):

> "Notwithstanding this parity of rates (during the two year period of the effectiveness of the former order), it appears from the evidence introduced at the further hearing that there was no movement of logs from Florida to Georgia during that period, except possibly an occasional carload."

The Commission therefore concluded (text 190):

> "* * * no finding in reference to undue prejudice against persons and localities in interstate commerce is necessary and we make no finding in that regard."

The Interstate Commerce Commission has not sought to justify its invasion of state domain on the ground of discrimination against persons and localities. It founds its invasion solely upon the revenue features of the Interstate Commerce Act as amended by the Transportation Act of 1920, Section 13(4) and Section 15a.

Nowhere in the Act is the power expressly given to prescribe intrastate rates in order to remove a revenue burden upon interstate commerce generally. But this Court has held that there was a "dovetail" relation between the "purpose" of the Act as set forth in Section 15a and the authority granted in Section 13(4), which authorized the interpretation that the Commission was vested with power to remove a revenue burden on interstate commerce caused by State rates.

Railroad Commission of Wisconsin vs. C. B. & Q. R. Co., supra;
New York vs. United States, supra;
Florida vs. United States, supra.

In discussing that interpretation in the appeal from the former order of the Commission in this proceeding this Court said (text 211-212):

> "The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the Federal power is exerted within what would otherwise be the domain of State power, the justification of the exercise of the Federal power must clearly appear."

The "purpose" of the Act as expressed in Section 15a is related to all carriers as a *whole*, or to all in each rate group as a *whole*, and to *aggregate* income as distinguished from the income of a particular carrier, and the recapture clause was declared by this Court to be "the heart of the plan."

Dayton-Goose Creek R. Co. vs. United States, supra.

(b) There was no "Substantial Disparity" Between Interstate and Intrastate Rates Upon Which the Commission Could Act.

We have pointed out that the general level of log rates in the Southern rate group had become that of the Cummer Scale or its equivalent, or lower. The Interstate Commerce Commission has never undertaken to fix any general level of log rates in the Southern Rate Group. This is a case involving intrastate rates on a single commodity on a single railroad within and throughout a single State where the Commission has never made any findings or orders with respect to the corresponding interstate rates, either from all of the State or from all of the railroads within any portion of the State or for the railroads as a body in the rate group, and where the general level of the rates on the commodity in the rate group, as voluntarily established by the railroads and permitted by the Commission, is substantially the same as the intrastate rate which the Commission seeks to supersede by its order.

The power of the Commission here sought to be exer-

cised with respect to intrastate rates has never been sustained except upon the theory that the order which it entered was raising the level of the intrastate rates to the general level of the interstate rates which were found to be discriminated against. In the *Wisconsin case (257 U. S., text 590-591)* the Court said:

> "Action of the Interstate Commerce Commission in this regard should be directed to *substantial disparity* which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." (Italics supplied.)

In the appeal from the former order of the Commission in this proceeding this Court said (282 U. S., text 211):

> "And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it."

In the recent decision of the case of *United States vs. State of Louisiana, supra*, the Court said:

> "This Court has consistently held that this section (Section 13(4)) is to be construed in the light of section 15a (2) and as supplementing it, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases in which disparity of the latter rates operates to thwart the broad purpose of section 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return. * * *"

And in the case last mentioned this Court differentiated between the order there involved and the order which the Court had dealt with in the appeal from the former order of the Commission in this proceeding, saying:

> "A question different from that before us was presented in Florida v. United States, supra. There the discrimination was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in northern Florida. It involved only one railroad and one commodity. It was not the general revenue proceeding authorized by Section 15a. The Court was careful to point out that the Commission had undertaken to establish a state-wide level of intrastate rates without any findings with respect to the corresponding interstate traffic which would tend to support the conclusion that a state-wide alteration of intrastate rates was necessary to protect the interstate commerce involved."

There is no "substantial disparity" between the interstate rates in the group and the intrastate rate operated upon by the order. The Commission has ignored the "purpose" of Section 15a as defined by this Court and was without the power to make the order here involved under the circumstances here set forth.

POINT IV.

THE FINDINGS WHICH THIS COURT HAS DECLARED TO BE "BASIC OR ESSENTIAL" TO THE MAKING OF A VALID ORDER BY THE COMMISSION HERE HAVE NOT BEEN MADE.

(Applicable to Assignments of Error Nos. 1 to 24, inclusive.)

In the decision of this Court (*Florida v. United States, 282 U. S. 194*) condemning the former order of the Interstate Commerce Commission for want of "basic or essential" findings, this Court declared that the findings which were lacking were (text 214-215):

> "The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues

and to maintain an adequate transportation service."

In our main brief in this case we have dealt at some length with the findings which the Commission made in connection with the order now under review and we have likewise fully reviewed the evidence, or lack of evidence, with respect to those various findings which this Court declared to be pre-requisite to the making of a valid order. We shall do no more here than briefly consider this subject, with the statement that it is fully covered in the main brief.

(a) There Was no Finding and No Evidence as to "the Revenue which had Been Derived by the Carrier from the Traffic in Question."

The Commission made no finding of the revenue which had been received by the carrier under the intrastate rate in question (the Cummer Scale of rates). It could not make any such finding because there was no evidence upon which it could be made. The carrier refused to disclose (R. 89-92), and the Commission refused to require it to disclose (R. 94-95, 715-719, 1153), the revenue which was received under the Cummer Scale of rates prior to the effective date of the former unlawful order of the Commission. After the Cummer Scale was restored the carrier showed (R. 1360-1370) the number of cars which moved in less than trainload lots, but showed nothing about the revenue received from such cars and showed nothing at all about the trainload movements of logs. The carrier likewise showed (R. 1180-1181) the number of cars which moved during a period of five months, but that period was

half within the time of the high rate and half within the time of the restored Cummer Scale and there is nothing to show how many of those cars moved under the one rate or the other. Also it showed nothing about revenue. *So there is nothing in the record from which the amount of revenue derived at any time under the Cummer Scale can be ascertained, and after the restoration of the Cummer Scale there is nothing from which even the number of cars which moved can be ascertained.*

(b) There Was No Finding as to the "Revenue Which Could Reasonably be Expected Under the Increased Rates", and no Evidence which would Support Such a Finding.

With respect to the revenue which could reasonably be expected under the increased rates proposed, the Commission had before it the record of the revenue which had been received by the carrier under two years application of the high rate prescribed by the former unlawful order of the Commission (R. 1101-1109). The Commission deducts from the 18,602 cars which moved in that two year period 3, 740 cars which were in trainload movements which have ended and divides the remaining 14,862 cars between the two years, thus getting 7,431 cars to the year (186 I. C. C., text 188). It then says "it seems probable" that "*under normal economic conditions*" the future movement under the high rate previously prescribed will be not less than this average of 7,431 cars per year (186 I. C. C., text 188). In making even that tentative prognostication it disregards the uncontradicted testimony of one shipper, who shipped in trainloads more than half of those logs so

counted by the Commission, that his trainload shipments will not again move at any rate substantially higher than the Cummer Scale (R. 783). It likewise disregards the uncontradicted testimony of other shippers, who shipped lesser quantities of logs during that period, that they would discontinue shipments if the high rate were again established (R. 962, 982). In particular, while recognizing in its report the existence of abnormal economic conditions at the time and making no prophecy as to the return of normal economic conditions, the Commission limits its finding as to the future movement under the rates prescribed in its order to "*normal economic conditions*," and not otherwise.

In connection with this insufficient finding the Commission adds its "belief" that the movement of logs in Florida will not be "materially curtailed" by the rates prescribed, which it says "are the same or substantially the same as the rates generally in effect and under which logs freely move throughout the South". (186 I. C. C., text 188). When it was later demonstrated that at this same time while the Commission was making its report and order here the railroads very generally throughout the South were putting into effect rates which the Commission found to be "on substantially the same level as the Cummer Scale", and when the representatives of the very railroads which had formerly maintained the high rates with which the Commission unfavorably compared the Cummer Scale testified in this proceeding that they had voluntarily put into effect these reduced rates in order to secure log traffic and showed that not only were logs not moving freely at the high rates they had been maintaining but also that under those high rates

the log traffic on those roads had been almost wholly destroyed, even then the Commission merely affirmed "all of the findings in our (its) prior report", (190 I. C. C., text 600).

The evidence showed that of the four large shippers, who alone paid to the carrier the sum of $652,311.87 (R. 731, 747, 766, 779) for the transportation of their logs in trainloads in 1926, and who testified in the original proceeding "that any material increase in the Florida intrastate rates would either cause them to move their plants to the timber or abandon operations", (282 U. S., text 214), only one remained. One of these shippers, who moved its plant to the woods *solely* because the former unlawful order of the Commission became effective, (R. 777), suffered a loss of $3,200,000 in making the move (R. 765) and the dismantling of its mill entirely destroyed the town of Eastport, then a town of 5,000 inhabitants in the environs of Jacksonville, (R. 767). We shall not deal specifically here with the losses suffered by other shippers, or the employees of those shippers, occasioned by the former order of the Commission or which it was testified would occur upon the present order of the Commission here involved becoming effective.

Deducting from the cars which moved during the two year period of the high rate the 3,740 cars, which the Commission found moved in two trainload movements which have ended, and deducting likewise the trainload movement of the remaining trainload shipper which movement will be discontinued under any rate substantially higher than the Cummer Scale according to the direct, positive and uncontradicted testimony of that

shipper (R. 783), we are left with a total of 4,222 cars moving in the first year of the high rate with a gross revenue derived therefrom of $101,370.68, and 2,973 cars moving in the second year of the high rate with a gross revenue derived therefrom of $66,179.49. It is evident that the traffic was almost wholly destroyed by just two years experience of the high rate prescribed by the former unlawful order.

The report of the Commission finds that pine wood is of primary importance in the lumber industry in Florida (186 I. C. C., text 173). Cypress is found to be next in importance, with hardwood third, the latter being cut incidentally to the logging operations in pine and cypress. In 1926, when this proceeding began, two shippers alone in Florida paid the carrier $167,391.47 for the transportation of pine logs in trainloads. The other revenues of the carrier from the transportation of pine logs in that year are unknown. In the first year of the high rate prescribed by the former unlawful order the entire revenue of the carrier from the transportation of pine logs in Florida amounted to $31,052.33 and in the second year it was but $5,288.84 (186 I. C. C., text 171). This shows what that order did to the transportation of the wood which is "of primary importance in the Florida lumber industry." And that little pine which did move during that second year of the high rate travelled an average distance of less than 13 miles, indicating plainly that it could not bear the rate at all for any but the very shortest hauls.

Omitting the trainload movements of the remaining trainload shipper, which will not move again at the high rate, the gross revenue of the carrier from cypress ship-

ments in the first year of the high rate was $73,866.00 and in the second year $36,387.01 (186 I. C. C., text 171). On hardwood the gross revenue of the carrier in the first year of the high rate was $96,971.97 and in the second year $28,658.90 (186 I. C. C., text 171). So the traffic in these logs was going the same way the pine log traffic had gone.

The only thing which this evidence demonstrates is that the high rate will destroy the traffic and "discourage patronage" and that the revenue produced under it will be trifling and inconsequential.

(c) There was no Finding that "The Alteration of the Intrastate Rates would Produce, or was Likely to Produce, Additional Income Necessary to Prevent Undue Burden Upon the Carrier's Interstate Revenues and to Maintain an Adequate Transportation Service," and no Evidence Upon which Such a Finding Could be Supported.

The Commission takes the 7,431 cars per year which it believes will move "*under normal economic conditions*" and, assuming that they would carry the average load and move the average distances of the cars which moved in the two years of the high rate, computes the revenue which would thus be received upon them under the Cummer Scale and the high rate prescribed by its former unlawful order respectively, ascertaining that the difference between the revenue so computed on the one scale and the other would be more than $100,000. It then says (186 I. C. C., text 189):

> "If the revenues yielded by the Cummer Scale are not sufficient to cover the cost of service, as the cost evidence indicates, it would follow that part of the above stated amount would constitute a dead loss in net revenue."

So, according to the belief of the Commission, the burden upon interstate commerce alleged to exist amounts under "*normal economic conditions*" to some indeterminate part of $100,000 a year. What it would amount to in the abnormal economic conditions prevailing at the time of the making of the Commission's order and ever since is not even estimated. But aside from the matters we have above pointed out and the fact that the cost evidence is utterly insufficient to demonstrate that "the revenue yielded by the Cummer Scale are not sufficient to cover the cost of service", we call attention to the fact that this is merely a computation of the earnings of a given number of cars, carrying a given weight and moving a given distance, under the two scales of rates.

The findings which this Court has said must be made have not been made and there is no evidence upon which they could be supported.

POINT V.

THE COST EVIDENCE IS INSUFFICIENT TO SUPPLY THE ESSENTIAL FACTS AS TO THE PARTICULAR TRAFFIC AND REVENUE AND THE EFFECT OF THE INTRASTATE RATES UPON THE INCOME OF THE CARRIER.

(Applicable to Assignments of Error Nos. 1, 3, 5 to 11, inclusive, and 24 to 31, inclusive).

The gist of the Commission's report on this subject is its conclusion that the revenue under the Cummer Scale is insufficient (text 187) "to cover the full cost of the service" and that therefore (text 176-177) "declines in the traffic have the favorable effect of reducing defendant's losses". Disregarding the fact that this is not a confiscation case and that the Courts of the United States are always open for the trial of such cases, the position of the Commission is that the carrier can come before it and undertake to prove that an intrastate rate produces less revenue than it believes to be the cost of the service and upon the Commission reaching that conclusion it can alter the rate.

The District Court agreed with that position saying (*4 F. Supp. 477*, text 480-481):

> "It was here established that the state rates produced a loss, and were a drain on the carriers. It might have been desirable to show the extent of the loss, but if that be impracticable,

> and if it appear that the loss will be in the future substantial and the carrier is not in position to absorb it without detriment to his service and support as an interstate carrier, a sufficient case is made to find an unjust discrimination against interstate commerce and to require its correction."

If that is the law then the Commission can decide as to the remunerative character of any and all intrastate rates and, upon its conclusion as to that character alone, alter them. If it be the law, it is certainly an innovation upon the law, for no such power over intrastate rates on the part of the Interstate Commerce Commission is to be found in any of the decisions of this Court, and no case by any Court was cited by the District Court in support of its above-quoted views. If it is not the law, and we think that, without more, the opinion of this Court on the appeal of the former order of the Commission thoroughly and effectively demonstrates it is not, then the Commission has erred in its concept of its duty and the District Court in its concept of the law, so that consequently the order here involved must go down. But putting this to one side, we propose to discuss briefly this cost evidence which was relied upon.

(a) The Cost Evidence Produced by the Carrier.

The cost evidence produced by the carrier is based upon two indefensible assumptions; first, that the average out-of-pocket or direct cost of handling one ton of the average of all freight one mile in Florida is the same

as the out-of-pocket or direct cost of handling one ton of logs one mile in Florida, and second, that the average relation of the direct costs to the indirect or overhead costs of handling all freight on the entire system is the same as the relation of the direct or out-of-pocket costs to the indirect costs of handling logs in Florida (186 I. C. C., text 177-180).

The out-of-pocket or direct costs incurred in the handling of *all* freight in Florida during the year 1929 is divided by the number of ton-miles made by *all* freight in that State in that year and the average direct or out-of-pocket cost per ton-mile thus ascertained (186 I. C. C., text 178). That average out-of-pocket cost per ton-mile is then assumed to be the out-of-pocket cost of hauling one ton of logs one mile (186 I. C. C., text 178).

The accountant of the Florida Railroad Commission pointed out (R. 839-840) that such an assumption took no account of the difference in cost of handling less-than-carload freight and carload freight, or of the difference in cost of handling freight in trainloads and carloads, or of the difference in cost of handling lightly loaded cars and heavily loaded cars. Nor did it take into account the difference in handling perishables which receive special service and logs which receive no special service whatever. Likewise it was pointed out that in addition to the special services required by perishables, their transportation is primarily an assembly service in Florida and the number of cars per train is less than in hauling logs and the loading is much lighter. It takes no account even of the difference in transportation cost per ton-mile between long hauls and short hauls, but proceeds upon the assumption that the direct cost of hauling

one ton one hundred miles is exactly ten times the direct cost of hauling one ton ten miles.

To illustrate the absurdity of this assumption we need only take a concrete example. Let us take thirty cars weighing fifteen tons each and load each car with ten tons of freight and move it in one train one hundred miles. We have seventy-five thousand gross ton-miles made by the train and applying to that figure the average direct cost per ton-mile (.0882888 cent) which the carrier used, we find that the direct cost of the movement is $66.22. Take forty of the same cars, load them each with thirty tons of freight, and move them the same distance. Using the same average direct cost per ton-mile, the direct cost of this movement is $158.92. The direct cost of one train so developed is nearly two and one-half times that of the other. Yet eighty-five per cent of the direct costs considered are made up of wages of the train crew and fuel for the locomotive (186 I. C. C., text 177). And everyone knows that the wages of the crews on the two trains considered would be identical or substantially so and that the difference in the fuel used in the two movements would be inconsequential. When we consider that the next assumption of the carrier is that these direct costs bear a fixed relation to total costs it is obvious how improper this method of determining costs of handling a particular commodity is, especially when, as is the case here, it is a low-grade commodity, requiring no special services and loading heavily to the car and with more cars to the train than the average.

The next assumption of the carrier in its cost evidence is that the direct or out-of-pocket expenses bear

a definite or fixed relation to total expenses. The direct expenses of handling all freight on the system are a certain percentage of the total expenses of handling all freight. Therefore having purported to ascertain the direct expenses of the log movement in Florida in the manner above set forth the carrier assumes that those direct expenses are the same percentage of the total expenses of the log movement as the percentage relationship between direct and total expenses in connection with the handling of all freight on the system.

The impropriety of that assumption is obvious and was demonstrated of record by the Florida Railroad Commission through its witness (R. 837-838) where it was pointed out that the out-of-pocket or direct costs depended primarily upon the number of trains operated and the time consumed by the trains between terminals, whereas the remaining costs for the most part "do not fluctuate according to the volume of business handled but represent expenses which are incurred regardless of the volume of business." It was also pointed out (R. 838):

> "* * * that, in a State like Florida where the traffic density is light, due to the large number of branch lines and being scattered over a wide area, thereby requiring the operation of a large number of trains to handle the same volume of business, the out of pocket expense would represent a much greater proportion of the total freight expense than they do on the system as a whole, where the train loading is

heavier and where fewer trains are operated to handle the same volume of business."

We have pointed out in our main brief that the use of system average costs to determine the cost of handling a particular commodity has been condemned by this Court and the Interstate Commerce Commission and that that Commission rejected this cost evidence saying that the unit cost per gross ton-mile so developed represented "merely the average out-of-pocket expense of handling all traffic in the third division" and "can not, therefore, be accepted as indicating the average out-of-pocket cost to defendant of transporting logs in Florida" (186 I. C. C., text 183). We here desire only to point out that the costs produced by this evidence are a combination of two system averages, first an average direct cost per ton-mile and, further, computed upon that, an average relationship of direct costs to indirect costs. It is a system average upon a system average, an unwarranted presumption upon an unwarranted presumption. And since it was discarded by the Commission we shall give it no further consideration here.

(b) The Cost Evidence Prepared by the Commission.

The cost evidence which the Commission prepared (186 I. C. C., Appendix E, text [illegible]-197) was a purely system average cost of the handling of all freight on the Atlantic Coast Line System with two exceptions. The first exception was that it deducted certain trifling expenses from the total system expenses, and the second

was that it increased the average cost by adding the cost of returning the empty car from the point of destination to the point of origin. The cost figures used by both the carrier and the Commission were those for the year 1929 instead of those of the abnormal years 1932 and 1933 when the order was to become effective.

The expenses which were deducted from the total expenses were less than four per cent. of those total expenses. In particular they were: maintenance of wharves and docks, floating equipment, outside agencies, advertising, traffic associations, industrial and immigration bureaus, and the small proportionate cost of superintendence and general expense in connection with these items so deducted (186 I. C .C., text 196). Every other expense of handling all freight was assumed to be just as applicable to and just as much occasioned by handling logs in Florida as any other freight handled anywhere on the system.

The Commission then divided all the remaining expenses between haulage and terminal expenses. It then divided the terminal expense (after making a deduction for the excess expense of handling less-than-carload freight over carload freight) by the number of cars of all freight handled in the year (on the assumption that all carload freight incurred the same terminal expenses) and found the average terminal expense per loaded car to be $6.46. The haulage expenses were then divided by the gross ton-miles made by all freight in the year, (on the assumption that one ton-mile of any and all freight cost just the same as another), and an "average haulage expense per gross ton-mile" of $.0021243 was determined. The Commission then determined the num-

ber of gross ton-miles involved in hauling the average car of logs in Florida the average distance and in hauling the empty car back to the point where it started, and multiplying this number of gross ton-miles by the "average haulage expense per gross ton-mile" produced a haulage expense for the average car of logs of $10.61.

Adding the terminal and the haulage cost so computed gave an operating cost of $17.07. If the Commission had left in all the trifling amounts, which it deducted from total expenses and which we have above enumerated, the operating cost would have been $17.77. Against this the Commission notes that the revenue from this same average car under the Cummer Scale would have been $15.12. But the Commission concludes that in addition to operating expenses the car should earn taxes and a return on investment of 5-3/4%, so it adds 44.655% of the operating expenses for that purpose resulting in a total cost of $24.69. If it had not left out the trifling accounts above mentioned this total cost would have been $25.71.

If it had left off the return empty movement of the car, which was not average of all freight traffic, the operating cost would have been $14.22, or less than the revenue under the Cummer Scale. Even adding in then the trifling accounts which were eliminated, the operating cost would be less than the revenue under the Cummer scale, and the Cummer scale would pay something toward taxes and profit.

We are astonished that the Commission is willing to treat the log traffic in Florida in every respect as if its cost were the average cost of handling all traffic, except that learning of one of the peculiarities of the log

traffic, namely, that the cars for the most part return empty, it adds that peculiarity on to the average cost and thereby—and solely thereby—brings the average operating cost above the revenue provided by the Cummer Scale.

The other peculiarities of the log traffic in Florida, namely, the heavy loading in the cars, the large number of cars to the train, the regularity of the movements, the simple nature of the equipment used, the fact that it requires no speedy or costly services, the fact that there are substantially no loss and damage claims in connection with it, the fact that the bulk of it requires substantially no terminal services or the simplest sort of terminal services, the fact that in the trainload shipments the shippers make most of the repairs to the cars, and the fact that the logs are processed at destination and thus produce additional traffic in the manufactured product, all these and the other peculiarities of this low grade traffic are disregarded. All these matters are purported to be taken care of by the trifling elimination which deducts seventy cents from the operating expenses of the average car or one dollar and two cents from the total cost of the average car, which total cost includes operating expenses, taxes and profit.

It is well known that the cost of handling a ton of freight in a heavily loaded car is less than the cost of handling a ton of freight in a lightly loaded car, and that the length of the haul varies the cost per ton-mile and that all of the other matters to which we have referred are material. The cost evidence prepared by the Commission is almost as purely a system average cost

study as could be made. We have shown in our main brief that such cost evidence is insufficient in such a proceeding as this to demonstrate anything and that both this Court and the Commission have condemned its use.

Northern P. R. Co. v. Dept. of Public Works, 268 U. S. 39;

California G. & S. P. League v. S. P. R. Co., 129 I. C. C. 25.

(c) There was no Justification for the Conclusions Reached by the Commission and by the District Court from the Cost Evidence.

The only other cost evidence was that with respect to the trainload shipments of the Wilson Cypress Company from Hines to Palatka in Florida during the month of November, 1930. That evidence showed an out-of-pocket or direct cost for that movement of $4.81 per car. The revenue under the Cummer Scale would have been $20.48 per car, and the revenue actually collected under the high rate then in effect was $41.60 per car (186 I. C. C., text 182).

Even this out-of-pocket or direct cost of $4.81 per car included a charge of five mills per ton-mile for the transportation of the coal used for locomotive fuel over the lines of the Atlantic Coast Line Railroad from the point where it was received by that railroad to Florida (R. 1206-1208), although the Commission had observed that no such charge was made in general in connection with coal (186 I. C. C., text 184).

The important thing disclosed by this evidence is that every time the railroad spent $4.81 (assuming for

this purpose the entire amount to be correct) it got back $20.48 under the Cummer Scale or $41.60 under the high rate then in effect. The difference between that cost of $4.81 and $20.48 under the Cummer Scale went toward the payment of the indirect and overhead costs of the railroad which went on whether the traffic moved or not. We are not dealing with a confiscation case here and the reasonableness of the rate "per se" is for the determination of the State authorities as this Court has declared. The subject of the inquiry was as to a burden on interstate commerce and the Interstate Commerce Commission has purported to find such a burden to exist. How can interstate commerce be burdened, or the transportation service impaired, by the railroad spending $4.81 and receiving back $20.48 every time it moves a car? If the railroad had that "burden" cast upon it in sufficient volume it might find itself in position to pay dividends. Of course that might not be the result. But in determining that question we would be dealing with the "reasonableness per se" of the rates.

We do not mean to be understood as saying that there are not indirect and overhead costs of a railroad toward which in all equity and fairness the component parts of the traffic should contribute. In determining the reasonableness of a rate the extent of that contribution is the dominant consideration. But we have hereinabove pointed out that the overhead and indirect costs do not vary in proportion to the volume of the traffic. To a great extent those expenses go on whether the traffic moves in volume or not. The additional ton of traffic which comes to the railroad can be aptly compared to the extra guest who comes to the hotel and occupies

a room which would be otherwise vacant. It is only by volume of traffic that these indirect and overhead costs of the railroad can ever be met. In 1932 the railroads were nearly all operating at a loss whereas some few years before they had been profitable enterprises, and this was not because the rates were not just as high in 1932 as they ever were, but because they were not securing the same volume of traffic.

When the Interstate Commerce Commission concludes that the Cummer Scale does not yield enough revenue to cover the "full cost of the service", it means that the Cummer Scale does not contribute as largely to the payment of these overhead and indirect costs as the Commission thinks it should, not that there is an out-of-pocket, or direct cost, loss on the operations at the Cummer Scale, for it would be impossible for it to reach the latter conclusion upon the evidence before it. We can not see how the railroad can be worse off financially or less able to perform its interstate functions or less able to render adequate transportation service if every time it moves a car it actually spends directly $4.81 and receives back $20.48. Certainly when we inquire further into the costs we are determining merely the "reasonableness per se" of the rate and can not be inquiring into any cause of impairment of the ability of the railroad to adequately perform the interstate transportation service required of it.

When the District Court declares that the State rates are a "drain on the carrier" we can only, with all due deference, say that that Court has not made the careful investigation of the record which the situation warrants. We do not here pretend to say whether the State

rates are "reasonable per se" or not. This is neither the proper time nor place for that determination. We do, however, confidently deny any statement that the rates are a "drain on the carrier" and by the same token we deny any statement that they impair the ability of the carrier to perform adequate transportation service, both interstate and intrastate.

Whatever may be the situation with respect to the reasonableness of the rate, the State authorities may at least claim jurisdiction of that territory between the point where intrastate rates actually impair the ability of the carrier to perform that adequate transportation service and the point where those rates are reasonable. If this small authority over its own rates does not even yet remain with the State, then not only has the Interstate Commerce Commission unified conrol over all rates but also we submit that this Court can not have meant what it said in the following plain and unambiguous statement contained in its opinion on the appeal from the former order of the Commission *(282 U. S., text 214)*:

> "But to justify the Commission in the alteration of intrastate rates, it is not enough for the Commission merely to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness per se of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission."

POINT VI

THE INTRASTATE RATES PRESCRIBED BY THE COMMISSION'S ORDER WERE MINIMUM RATES DEFINITELY FIXED AT A PARTICULAR LEVEL AND NOT RELATED TO OR DEPENDENT UPON ANY INTERSTATE RATES. THE PRESCRIPTION OF SUCH RATES BY THE COMMISSION IS UNLAWFUL AND ARBITRARY.

(Applicable to Assignments of Error Nos. 5, 23, 43 and 44.)

The order of the Commission (R. 79) requires that the Atlantic Coast Line Railroad "establish, put in force and maintain rates for the transportation of logs" of the tariff description here involved,

> "* * * in intrastate commerce within and throughout the State of Florida for distances of 170 miles or less, which shall be the same as those set forth in Appendix F to the aforesaid report on further hearing."

The caption of Appendix F (R. 78) is "Minimum rates Prescribed Herein on Florida Intrastate Log Traffic," and the distances and rates are then set forth.

Thus the intrastate rate here prescribed is a minimum rate statewide in its application, fixed at a certain level expressed in cents per 100 pounds for the distances set forth. The intrastate log rates of the Atlantic Coast Line

Railroad throughout the State of Florida are "frozen" at this level by the order. And it will be observed that the maintenance of these intrastate rates is in nowise dependent upon the maintenance of any interstate rates.

This point was considered in the Louisiana case, *(United States v. State of Louisiana, supra)*, this Court there pointing out that the order there involved was likewise assailed because the intrastate rates involved were minimum rates whereas the Commission in its order fixing the general level of interstate rates "did not require the carriers to increase their rates interstate, but only permitted them to do so at their option." This Court there answered that contention by saying:

> "The order precluded any unauthorized interference with State regulatory power by providing that it should be effective only so long as the surcharges upon interstate rates should be maintained by the carriers."

But in the case at bar there are no statewide interstate rates prescribed to which the intrastate rates could be related, and the intrastate rates prescribed are not dependent for their existence or continuance upon any interstate rates. The hands of the "State regulatory power" of the State of Florida are effectually and completely tied by the order and its dominion over its state rates wholly usurped. The interstate rates prescribed in 1928 for the non-existent traffic from Northern Florida points to Georgia might be changed or ended at any time, but such action would have no effect upon the intrastate rates here prescribed.

POINT VII

THE STATE OF FLORIDA IS ENTITLED TO A TRIAL DE NOVO UPON THE EXISTENCE OF THE JURISDICTIONAL FACTS WHICH WOULD ENTITLE THE FEDERAL AUTHORITY TO INVADE THE STATE DOMAIN.

(Applicable to Assignments of Error Nos. 11, 26, and 34 to 43, inclusive.)

The Federal Government has no concern with or authority over intrastate rates as such. It is only when those intrastate rates interfere with or cast some burden upon interstate commerce that the Federal Government may exercise any jurisdiction over them. The interference or burden must exist or the power to remove it does not exist, and until it does exist the regulation of the rates is among the "reserved powers" of the State.

Even when the interference or burden does exist it may be of such sort or character that Congress has not chosen to exercise the Federal power of removal.

Minnesota Rate Cases, supra.

We think that we have demonstrated that the interference or burden upon interstate commerce here alleged to exist (by the reports and orders of the Interstate Commerce Commission) is not such an alleged interference or

burden as Congress in the exercise of the Federal power has directed the removal of. That being true, there is no occasion for any consideration of the character of review which must be made of the determination of the existence of the alleged interference or burden.

Assuming, however, for the purpose of this argument, that the interference or burden is alleged to be of such sort or character as Congress in the exercise of the Federal power has directed the removal of, we nevertheless point out that the actual existence of that alleged interference or burden is prerequisite to the existence of the power to remove it. And the determination of its actual existence is the determination of the jurisdiction to act.

The determination of such a question by the Interstate Commerce Commission is a very different matter from a determination by that Commission with respect to interstate rates, for over interstate rates both the Congress and that Commission have direct and exclusive control. This was pointed out in our main brief in this case, and we there referred to the character of findings which must be made by the Commission when superseding intrastate rates and demonstrated that in such cases "the justification of the exercise of the Federal power must clearly appear" to the Court.

We here again point out that there can be no question that the fact of the existence of the alleged interference with or burden upon interstate commerce is a jurisdictional fact and must be determined before there can be any jurisdiction to act.

(a) When the Determination of the Existence of the Jurisdictional Facts Upon Which Rests the Jurisdiction of an Administrative Agency to Act Involves Constitutional Rights, One Whose Constitutional Rights Are Invaded by such Determination, is Entitled to a Trial Before the Court Upon the Existence of those Jurisdictional Facts.

In the case of *Crowell v. Benson, 285 U. S. 22*, the Court, for the first time, considered and announced the rule as to the character of review which the courts must give as to findings of *jurisdictional facts* made by administrative tribunals where such findings involve constitutional rights.

That case arose out of an award made by the United States Employees' Compensation Commission under the Long Shoremens' and Harbor Workers' Compensation Act. Benson, against whom the award was made, applied to the Court for a trial de novo upon the jurisdictional facts involved. Under the Long Shoremen's Act, the jurisdiction of the Commission depended upon the claimant having been employed by the person against whom the award was sought and the injury for which award was claimed having occurred upon the navigable waters of the United States. It was claimed by Benson that the determination of these jurisdictional facts must be made independently by the Court and that in such determination he was entitled to a trial de novo, and that his right to such determination rested upon the Constitution of the United States.

The suit was instituted in the United States District Court for the Southern District of Alabama, which court

granted a hearing de novo and held that the evidence did not establish the jurisdictional facts and restrained the enforcement of the award. *33 F. (2d) 137; 38 F. (2) 306.* On appeal the United States Circuit Court of Appeals for the Fifth Circuit affirmed the decree. *45 F. (2) 66.*

On appeal, this Court affirmed the decision of the Fifth Circuit Court of Appeals and held that the Congress had authority to prescribe the procedure in cases of injury upon navigable waters, and to commit the determination of the facts, as to the circumstances, nature, extent and consequences of the injury sustained, to the Compensation Commission established by it. But the Court then said (text 54-55):

> "What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional', in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly, but also *because the power of the Congress to enact the legislation turns upon the existence of these conditions.*" (Italics supplied.)

It will be noted that the Court points out that the

power of Congress to enact the legislation "turns upon the existence of these conditions", i. e., the jurisdictional facts of employment and that the injury occurs upon navigable waters of the United States.

In the case at bar the power of Congress to legislate as to intrastate rates "turns upon the existence" of the fact of interference with or burden upon interstate commerce. Unless that fact exists the Congress itself may not, under the Constitution, enact legislation with respect to intrastate rates, and, of course, may not authorize a tribunal, created by it, so to do.

The Court in the Crowell case dealt with the organic provision of the Constitution that the judicial power of the Federal Government is vested in the Courts, and speaking of these jurisdictional facts said (text 56-57):

> "In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of

> administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and *finality as to facts becomes in effect finality in law.*" (Italics supplied.)

Cases may be cited (and were cited by the District Court in the case at bar as we shall hereinafter show) establishing the conclusiveness of orders of the Interstate Commerce Commission in respect to interstate rates where there is any substantial evidence to support the order. In the Crowell case the Court considered those decisions and said (text 58):

> "Similar considerations apply to decisions with respect to determinations of fact by boards and Commissions created by the Congress to assist it in its legislative process in governing various transactions subject to its authority, as for example, the rates and practices of interstate carriers, the legislature thus being able to apply its

standards to a host of instances which it is impracticable to consider and legislate upon directly and the action being none the less legislative in character because taken through a subordinate body. And where administrative bodies have been appropriately created to meet the exigencies of certain classes of cases and their action is of a judicial character, the question of the conclusiveness of their administrative findings of fact generally arises where the facts are clearly not jurisdictional and the scope of review as to such facts has been determined by the applicable legislation. None of the decisions of this sort touch the question which is presented where the facts involved are jurisdictional or where the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limitations."

The case here comes squarely within the language above quoted, because here "the facts involved are jurisdictional" and "the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limitations."

This case is brought to enforce the reserved powers of the State of Florida under the Federal Constitution, and the judicial power of the United States is invoked to that end. We, therefore, rely upon the decision of the Court in the case under discussion, and point out further that it was there said (text 60):

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."

The determination of the existence of the alleged interference with or burden upon interstate commerce is the determination of a jurisdictional fact. Finality as to the determination of that fact "becomes in effect finality in law." And the determination of that fact adversely to the contentions of the State of Florida invades and usurps the powers of that State reserved to it under the constitution of the United States. We submit that upon the question of the existence of the jurisdictional fact the State of Florida was and is enitled to a trial de novo before the *judicial* department of the government.

(b) The Character of Judicial Review of the Jurisdictional Facts Accorded by the District Court in This Case Was Improper and Insuffcient.

In deciding what character of review it would give to the determination of these jurisdictional facts the District Court said *(4 F. Supp., text 481)*:

> "When, however, the very fact upon the existence of which the power to act depends has been contradictorily tried before the Commission itself, its conclusion fully expressed upon its record affirm-

ing the existence of the fact is certainly sufficient to put the burden upon those who deny it."

The District Court then refers to five decisions of this Court in which the rule was established that findings of the Commission will not be set aside if supported by "substantial evidence." Four of those decisions so referred to related solely to orders of the Commission with respect to *interstate* rates, and the fifth related to an order of the Commission with respect to a *practice* of interstate carriers in dealing with certain warehouses. Having referred to those cases and the "substantial evidence" rule there laid down, the District Court said (text 482):

> "We need not decide whether in this case the Commission's finding of unjust discrimination is entitled to any less weight because it is a prerequisite of its jurisdiction as well as the meritorious basis of its exercise, because we have examined the evidence independently and are led to the same conclusion that the unjust discrimination exists."

We respectfully submit that in its independent examination of the evidence the Court has misapprehended it, for it says (text 479):

> "On the question of the cost of the service, figures were considered which showed the average cost of hauling logs over the Coast Line System; exact figures for the particular traffic in Florida not being available."

We have pointed out that what was considered was the *average* cost of hauling a ton of the *average* of all freight on the System, and because a ton of logs under the Cummer scale did not produce revenue equal to that average cost, including taxes and profit, it was concluded that the Cummer scale was a burden on interstate commerce. The Court was in error as to this evidence and the opinion demonstrates that the erroneous conclusion so reached is the very foundation of its decision.

Again the Court, upon its independent examination of the evidence, finds (text 479) that "there was no substantial increase (in the log traffic) after the Cummer rates were restored following the decision of the Supreme Court above referred to." We have pointed out and here repeat that the record does not show either the revenue received or the volume of the traffic after the Cummer scale of rates was restored—not even for so much as one single day.

This is not the kind of determination of the facts, either jurisdictional facts or otherwise, which the State is entitled to have before its rightful domain is invaded and its reserved powers usurped.

In and by its bill of complaint and its supplemental bill of complaint the State of Florida asserted its right to a trial de novo upon these jurisdictional facts and demanded such trial (R. 25-26 and 359-360). It has steadfastly adhered to its assertion of that right and that demand and now and here repeats them.

CONCLUSION.

We respectfully submit that the foregoing pages, as well as the main brief, demonstrate that the order of the Interstate Commerce Commission under attack must be annulled and set aside because, among other things:

(*a*). Not even the dominating force of former Section 15a of the Interstate Commerce Act construed with the "supplementing" aspect of Section 13 (4) was sufficient to authorize the Commission solely in the interest of carrier revenue to invade State domain and strike down a single rate upon a single commodity, upon a single railroad, statewide in a single State, where no general level had been prescribed for the same commodity, either in the rate group or in the area in which the state rate was stricken down. Now that the dominating force of Section 15a is gone, there is no substantial color to support the contention that the authority *exists*. Otherwise, to that extent the Interstate Commerce Act as now amended would be inoperative and ineffective for the constitutional reasons pointed out above.

(*b*). If under any circumstances a grant of any such authority could be construed to have existed, the exercise of such authority was inappropriate to the grant under the circumstances of this particular case, and unjustifiable, under the former law, and without color of propriety or justification when and after the new law intervened.

(*c*). The Commission had fixed no general level of log rates for interstate commerce in the Southern Rate Group and had prescribed no interstate log rates in Florida except from North Florida origins to Georgia destinations on this single railroad, and has prescribed no other interstate log rates at all except a few isolated point-to-point maximum rates. The Florida intrastate rate prescribed by the Commission was a *minimum* rate, statewide in its application, and was "frozen" at the specified level, whereas the interstate rate prescribed applicable from North Florida points only to Georgia points for the non-existent interstate commerce was a *maximum* rate, the subsequent alteration of which by the carrier would in no wise affect the "frozen" intrastate rates.

(*d*). At one and the same time that it fixed for intrastate commerce in Florida minimum rates at almost twice the level of the state rate; it was permitting twenty-two carriers in the Southern Rate Group (including most of the railroads operating in most of the states of that rate group) to establish both interstate and intrastate rates found by the Commission to be substantially on the level of the Florida state rate condemned.

(*e*). The Commission failed to make the findings which this Court upon the former appeal specified must be made in order to justify the attempted invasion of state domain with respect to

carrier revenue. And such findings as the Commission did make were not only insufficient as such, but also related only to "normal economic conditions", although the report and order were made in the midst of abnormal times.

(*f*). The evidence did not support the "basic and essential findings" necessary to a valid order. Not only is it insufficient to support the order, but the Commission misapplied the law to such evidence as was adduced, including the cost evidence.

(*g*). An increase in log rates will not produce an increase in revenue. That is demonstrated by the havoc wrought by the former unlawful order of the Commission, by the almost total destruction of the log traffic in Florida by that order, and by the fact that many if not most of the other railroads in the Southern group whose rates were used as standards of comparison to condemn the Florida state rates, had established at the time of the entry of the order now under attack, rates which were substantially commensurate with the Cummer scale.

(*h*). The State of Florida in due course demanded a trial *de novo* by the judicial arm of the government upon the jurisdictional facts, and such trial was erroneously denied by the District Court.

(*i*). The action of the Commission was unwarranted and unjustified.

We respectfully submit that the order of the Interstate Commerce Commission under attack is unauthorized, unlawful and invalid under the Federal Constitution and the laws of Congress, existing at the time that the order was made, as well as upon and after the amendment of the Interstate Commerce Act by the Emergency Railway Transportation Act, 1933.

Respectfully submitted,

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THEO. T. TURNBULL,
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APPENDIX

STATUTES RELIED UPON

The Interstate Commerce Act (41 Stat. at L. 484, 488).

SECTION 13:

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SECTION 15a:

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless op-

erated as a part of a general steam railroad system of transporation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making

such determination it shall give due consideration among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purpose of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value

thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway prop-

erty and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provision of this paragraph shall not be applicable to the income for any perior prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

(7) For the purpose of paying dividends or interest on its stocks, bonds or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it unler this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportion either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositaries of the United States subject to the rules promulgated from time to time by the Secretary of the Treasury relating to Government deposits.

(11) A carrier may at any time make application to the Commission for a loan from the general railroad contingent fund, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and

the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

(12) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan from the general railroad contingent fund is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may make a loan to the applicant from such railroad contingent fund, in such amount, for such length of time, and under such terms and conditions as it may deem proper. The Commission shall also prescribe the security to be furnished, which shall be adequate to secure the loan. All such loans shall bear in-

terest at the rate of 6 per centum per annum, payable semi-annually to the Commission. Such loans when repaid, and all interest paid thereon, shall be placed in the general railroad contingent fund.

(13) A carrier may at any time make application to the Commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon and to meet the requirements of its obligations under the lease, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the psysical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of leasing such equipment or facilities to the applicant as the Commission may deem pertinent to the inquiry.

(14) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities, in whole or in part, is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant is such

as to furnish reasonable assurance of the applicant's ability to pay promptly the rental charges and meet its other obligations under such lease, the Commission may lease such equipment or facilities purchased by it from the general railroad contingent fund, to the applicant for such length of time, and under such terms and conditions as it may deem proper. The rental charges provided in every such lease shall be at least sufficient to pay a return of 6 per centum, plus allowance for depreciation determined as provided in paragraph (5) of section 20 of this Act, upon the value of the equipment or facilities leased thereunder. All rental charges and other payments received by the Commission in connection with such equipment and facilities, including amounts received under any sale thereof, shall be placed in the general railroad contingent fund.

(15) The Commission may from time to time purchase, contract for the construction, repair and replacement of, and sell, equipment and facilities, and enter into and carry out contracts and other obligations in connection therewith, to the extent that moneys included in the general railroad contingent fund are available therefor, and in so far as necessary to enable it to secure and supply equipment and facilities to carriers whose applications therefor are approved under the provisions of this section, and to maintain and dispose of such equipment and facilities.

(16) The Commission may from time to time prescribe such rules and regulations as it deems necessary to carry out the provisions of this section respecting the making of loans and the lease of equipment and facilities.

(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

(18) Any carrier, or any corporation organized to construct and operate a railroad, proposing to undertake the construction and operation of a new line of railroad to retain for a period not to exceed ten years all or any part of its earnings derived from such new construction in excess of the amount heretofore in this section provided, for such disposition as it may lawfully make of the same, and the Commission may, in its discretion, grant such permission, conditioned, however, upon the completion of the work of construction within a period to be designated by the Commission in its order granting such permission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 342.

STATE OF FLORIDA, ET AL., *Appellants*,

versus

UNITED STATES OF AMERICA, ET AL., *Appellees*.

Appeal from the District Court of the United States for the Northern District of Georgia, Atlanta Division.

ADDITIONAL MEMORANDUM OF F. S. BUFFUM CO., INCORPORATED, BEING SUPPLEMENTAL TO POINT VII OF THE APPELLANTS' BRIEF, AND ALSO DEALING WITH THE LEGISLATIVE HISTORY OF THE AMENDMENT TO SECTION 15a OF THE INTERSTATE COMMERCE ACT, WHICH BECAME EFFECTIVE ON JUNE 16TH, 1933.

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INDEX.

Page

The Commission's So-Called "Computations of Cost", as Set Forth in Its Appendix E, and Explained in Its Report, is Based Upon System Average Costs, a Method Which Has Been Condemned by the Courts. The Resultant So-called "Total Cost Per Car" is Actually Higher Than the System Average "Total Cost Per Car", of Handling All Freight. Not Only is the Method Fundamentally Unsound for the Determination of the Cost of Handling Any Particular Commodity, but the Result of Its Use is Obviously and Especially Unsound as Applied to Any Such Low-Grade Heavy-Loading Commodity as Logs 2

The Congress, in Amending Section 15a in 1933, Did Not Impose An Affirmative Duty Upon the Commission to Prescribe Rates so as to Provide a Fixed Return, and Did Not Follow the Recommendations of the Commission as to the New Law to be Substituted for Former Section 15a 8

Appendix E 12

CASES CITED.

Investigation & Suspension Docket 26, 26-c, 22 I. C. C. 604, 620 5

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The so-called "total cost per car", computed by the Commission in its Appendix E,* which includes taxes and full return on investment, is $24.69 per car, which is the equivalent of revenue per loaded car-mile (the particular movement being 81.36 miles), of.....30.3 cents.

The average operating expense per loaded car-mile on *all freight* of the Atlantic Coast Line for the year 1929 (total freight expenses of $36,308,813, divided by total loaded car miles of 209,835,784), was.....17.3 cents.

The average revenue per loaded car-mile on all freight traffic of the Atlantic Coast Line for the year 1929 (total freight revenue of $53,188,639, divided by total loaded car-miles of 209,835,784) was.....25.3 cents.

The revenue per loaded car-mile under the minimum rate prescribed by the Commission (the rate of 5.5 cents per hundred pounds applied to the average car containing 56,754 pounds of logs, divided by the 81.36 miles which was the average distance of the movement), on logs is 38.4 cents.

This bare statement of comparative revenues and expenses per car-mile demonstrates that the Commission's

*A copy of Appendix E is hereto appended exactly as set forth in the Commission's report, except that, for the purpose of ready reference, the items of the computation have been numbered consecutively, and are hereinafter referred to by those numbers.

Appendix E formula is unsound. For it is obvious that the per car-mile revenue on one of the lowest grade commodities, logs, ought not and cannot be expected to pay rates which will yield per car-mile revenues which are in excess of the average car-mile revenues yielded by all freight, including manufactured articles and perishable fruits and vegetables, and the like, and including likewise less-than-carload freight. It is equally obvious that the cost per car per mile of handling logs cannot be greater than the average cost per mile of handling all freight. Yet such is the deduction of the Commission from its computation, and such is the effect of its order.

We shall briefly demonstrate how this fallacious deduction is arrived at in the computation. It will be noted that the operating expenses are segregated between haulage and non-haulage expenses. The non-haulage expenses are those in connection with terminals and yards, and the haulage expenses are the other expenses incurred.

Dealing first with the non-haulage expenses, we observe that the Commission shows the "Average Non-Haulage Expense per Loaded Car", as $6.46 (Item numbered 27 of Appendix E). This figure is arrived at by dividing all non-haulage expenses on all freight handled on the system (omitting a few trifling and inconsequential items) by the number of loaded cars of all freight handled on the system. It assumes that a car of logs incurs the same non-haulage or terminal and yard expenses, as any other car of any other freight.

We first call attention to the fact that the average car of all freight moved an average loaded distance of 173 miles (Item 23 of Appendix E, divided by Item 26). The average loaded log car moved 81.36 miles (Item 37). Obviously, the average loaded car moving 173 miles receives greater yard and terminal service than it would in moving 81 miles. If we merely reduced this to a per loaded car-mile basis the non-haulage expense for 81.36 miles would be $3.03 instead of $6.46. This alone would reduce the so-called total op-